

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition of USTelecom for Declaratory)	WC Docket No. 13-3
Ruling That Incumbent Local Exchange)	
Carriers Are Non-Dominant In The)	
Provision of Switched Access Services)	

**COMPTTEL’S OPPOSITION TO USTELECOM’S PETITION
FOR DECLARATORY RULING**

COMPTTEL, through undersigned counsel, hereby opposes the United States Telecom Association’s (“USTelecom”) Petition For Declaratory Ruling that all incumbent local exchange carriers (“ILECs”) nationwide be declared non-dominant in the provision of residential and business switched access services. Section 1.2 of the Commission’s Rules, 47 C.F.R . §51.2, provides that the Commission may issue a declaratory ruling to terminate a controversy or remove uncertainty. USTelecom readily admits that ILECs continue to have market power and remain dominant in the switched access market.¹ As a result, the existence of the ILECs’ market power and dominance is neither uncertain nor a matter of controversy. For this reason alone the Commission should deny USTelecom’s Petition.

USTelecom requests that ILECs be afforded non-dominant treatment with respect to tariffing of switched access services and the discontinuance, impairment and reduction of switched access services. It also requests that ILECs be accorded the same streamlined treatment

¹ Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services at 9, n.16 (“USTelecom Petition”).

for transfers of control that non-dominant carriers receive.² In considering USTelecom's Petition, the Commission should only address and should confine any ruling to the four corners of the actual request for relief. The caption of USTelecom's Petition and its conclusory request for relief³ ask for a declaratory ruling that all ILECs are "non-dominant in the provision of switched access services." Curiously, USTelecom contends that that the question of whether ILECs possess market power "with respect to their own end users is not at issue in this Petition."⁴ The existence of such market power, however, precludes a finding that ILECs are non-dominant in the provision of switched access services.

The Commission has long recognized that switched access providers serve two separate and distinct customer groups: (1) interexchange carriers ("IXCs") that purchase originating and terminating switched access services as an input for the long distance services that they provide to their end user customers; and (2) end users who benefit from the ability, provided by access service, to place and receive long distance calls.⁵ Likewise, the Commission has recognized that switched access charges have two separate rate components – the per minute carrier's carrier charges imposed on interexchange carriers and the flat rated subscriber line charge ("SLC") imposed on end users. USTelecom does not separately address the two types of switched access services or the market power that ILECs exercise in the provision of either. Accordingly,

² USTelecom Petition at 9-10.

³ USTelecom Petition at 1 and 48.

⁴ USTelecom Petition at 9, n. 16.

⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, 24 FCC Rcd 13, 997 at ¶ 111 (2010) ("*Phoenix Forbearance Decision*"), *aff'd sub nom. Qwest Corporation v. Federal Communications Commission*, 689 F. 3d 1214 (10th Cir. 2012).

USTelecom has failed to demonstrate that any, let alone all, ILECs are entitled to non-dominant treatment.

I. The Future of End User Switched Access Regulation Is the Subject of the Further Notice of Proposed Rulemaking in the Intercarrier Compensation/USF Proceeding And Should Be Addressed There Rather Than Here

In the Intercarrier Compensation/Universal Service Reform proceeding, the Commission has requested comment on what the appropriate role is for regulated end user charges for voice service in today's telecommunications marketplace.⁶ Among the issues the Commission is reviewing are the magnitude of the SLC, the long-term role of the SLC, if any, and whether the SLC should be eliminated altogether.⁷ If the Commission eliminates the SLC, there will be no need to address USTelecom's request that ILECs be treated as non-dominant in the tariffing of end user switched access service. Rather than divert time and resources to the evaluation and analysis of an issue that may be rendered moot by any determination made in the rulemaking proceeding, the Commission should defer action on USTelecom's request for non-dominant treatment of end-user switched access service charges until the rulemaking proceeding is concluded.

Moreover, USTelecom's request that all ILECs be treated as non-dominant for purposes of the Commission's discontinuance, reduction or impairment of service and transfer of control regulations lacks even the slightest evidentiary support. USTelecom cites nationwide trends in access line and market share loss suffered by ILECs in general, but does not reference or discuss market share or lines lost by any individual carrier on whose behalf it requests non-dominant

⁶ *In the Matter of Connect America Fund, et al.*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 at ¶¶1330-1334 (rel. Nov. 18, 2011) (“*Connect America Fund*”).

⁷ *Id.*

treatment. The National Exchange Carriers Association (“NECA”) reports that it has 1,300 local telephone company members.⁸ If USTelecom were to be successful in its petition for a declaratory ruling that all ILECs are non-dominant in the provision of switched access service, NECA’s members would all be relieved of dominant carrier regulation without any evidence or analysis of the market power that any one of those members enjoys in its local exchange area or of the availability of competitive voice alternatives to any of the residents of those local exchange areas. The Commission cannot possibly make assumptions about the competitiveness of the end user switched access market in any one ILEC’s local exchange service area based on the type of non-geographic, non-market specific data referenced by USTelecom. While the Commission defined the relevant geographic market as national in finding that AT&T was no longer dominant in the provision of long distance service,⁹ such a national market definition is inappropriate here where USTelecom seeks nondominant treatment for the provision of end user access to the local exchange network.

With respect to the tariffing issue, the Commission’s rules establish the maximum rate that ILECs may assess for business and residential SLCs.¹⁰ Under existing dominant carrier regulation, ILECs are free to lower the SLCs they charge their end users. The primary advantage ILECs would realize in being relieved of dominant carrier tariffing regulation of subscriber line charges, therefore, would be the ability to unilaterally increase on one day’s

⁸ https://www.neca.org/cms400min/NECA_Templates/PublicInterior.aspx?id=7088 (visited on February 14, 2013).

⁹ *In the Matter of Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271 (1995).

¹⁰ See Sections 69.104 and 69.152 of the Commission’s Rules, 47 C.F.R. §§69.104, 69.152.

notice the amount they assess end users for SLCs above the caps set by the Commission.¹¹ The power to control price, of course, is evidence of dominant carrier market power.¹² In a truly competitive market, consumers should be able to reap the benefit of lower, not higher, prices.¹³

In light of USTelecom's failure to demonstrate that all ILECs in the United States lack market power in their local exchange areas, the Commission must deny its request that all ILECS be deemed non-dominant in the provision of end user switched access service.

II. ILECs Continue To Have Market Power in the Carrier's Carrier Switched Access Market

USTelecom requests that ILECs be afforded non-dominant treatment with respect to tariffing, discontinuance, impairment and reduction of carrier's carrier switched access services and that they be accorded the same streamlined treatment for transfers of control that non-dominant carriers receive.¹⁴ Citing the *Competitive Carrier First Report and Order* and the *AT&T Non-Dominance Order*,¹⁵ USTelecom acknowledges that the Commission defines dominant carriers as those that possess market power and that control of bottleneck local access facilities is evidence of such market power.¹⁶ And as noted, USTelecom concedes that ILECs

¹¹ See, *Phoenix Forbearance Decision* at ¶ 114.

¹² *Id.* at ¶ 5; see also 47 C.F.R. § 61.3(q) (a dominant carrier is a carrier having market power (the power to control prices)).

¹³ See, e.g., The National Broadband Plan at 25, 36.

¹⁴ US Telecom Petition at 9-10.

¹⁵ *Policy and Rules Concerning Rates For Competitive Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, 77 FCC 2d 308 (1979); *In the Matter of Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271 (1995).

¹⁶ USTelecom Petition at 13-14. See also, *Phoenix Forbearance Decision* at ¶5 (control of bottleneck facilities is "prima facie evidence of market power").

continue to have market power and to control bottleneck facilities for carrier's carrier switched access services. Having failed to demonstrate that ILECs do not have market power or a bottleneck monopoly in the switched access market, USTelecom's request for non-dominant treatment must be denied.

USTelecom's request for relief is limited to switched access services. Nonetheless, in arguing that ILECs should no longer be treated as dominant in the provision of switched access services, USTelecom focuses solely on the loss of access lines and market share that ILECs have sustained in the retail market and the availability to end users of allegedly comparable retail services from other providers, including wireless and VoIP providers.¹⁷ The originating and terminating switched access services that ILECs provide IXCs, however, are not retail services. IXCs face a bottleneck monopoly from the ILECs that provide access to their end users because unlike the end users, the IXCs do not have the ability to choose competitive alternatives in the market in which they purchase services.¹⁸ The Commission has explicitly made clear, and USTelecom concedes, that as long as switched access charges may be imposed by tariff, the market for those charges is not structured in a way to allow competition to discipline rates for carrier's carrier charges.¹⁹

In the *Phoenix Forbearance Decision*, the Commission specifically rejected as improper exactly what USTelecom is asking the Commission to do here: *i.e.*, grant non-dominant

¹⁷ USTelecom Petition at 15-40.

¹⁸ *Phoenix Forbearance Decision* at ¶79.

¹⁹ *Id.* See also USTelecom Petition at 9, n. 16 (“So long as the Commission requires interexchange carriers to interconnect with LECs, and such carriers are permitted to file tariffs dictating the rates, terms and conditions on which such interexchange carriers must exchange traffic with them, LECs will continue to have power with respect to their own end users.”)

treatment for carrier's carrier services based on allegations that the retail market for end user services is competitive:

[I]n the *Qwest Omaha Forbearance Order*, the Commission granted conditional forbearance from dominant carrier regulation of [carrier's carrier] charges. . . . In at least partial recognition of the end-user monopoly problem, the Commission imposed a condition designed to approximate the regulatory regime applicable to competitive LEC carriers' carrier switched access charges. In particular, access charges imposed by competitive LECs on their carrier customers by tariff are presumed to be just and reasonable if the rates are at or below a benchmark that is the rate of the competing incumbent LEC. In an effort to approximate this regime for Qwest, the Commission conditioned forbearance on Qwest benchmarking to Qwest's own then-existing carriers' carrier switched access charges. We decline to perpetuate this approach here. The *Qwest Omaha Forbearance Order* granted relief [from dominant carrier regulation of switched access services] based on competitive findings regarding retail end-user services – which do not pose a competitive constraint on a LEC's carrier's carrier switched access charges. Thus, the approach of the *Qwest Omaha Forbearance Order* is divorced from the competitive claims that were the foundation of the relief requested there and in similar petitions.²⁰

The Commission correctly declined to follow the reasoning used in the *Qwest Omaha Forbearance Order* to grant Qwest non-dominant treatment in the provision of switched access services in Phoenix and it should reach the same result in ruling on USTelecom's Petition. The existence of alleged competition in the retail market cannot serve as a basis for finding that ILECs do not have market power in the switched access market. USTelecom's request for relief from dominant carrier regulation must be denied.

USTelecom's assertions that ILECs face competition from a greater number of facilities based and non-facilities based competitors than did AT&T at the time the Commission declared it non-dominant and that the Commission should follow the example of the "large number of states" that have deregulated retail voice service in the face of competition from VoIP and

²⁰ *Qwest Phoenix Forbearance Order* at ¶112.

wireless providers²¹ similarly miss the mark and must be rejected as irrelevant. AT&T was found non-dominant in the retail long distance market at a time when end users could easily change their retail long distance provider. In contrast, carrier's carrier switched access services are neither retail services nor subject to competition in the market in which they are sold to IXC's. Because ILECs continue to maintain bottleneck control over access to their local exchange customers, any deregulation in or finding of non-dominance in the retail voice market cannot possibly serve as precedent for a finding that ILECs are no longer dominant in the carrier's carrier switched access market.

III. USTelecom Has Failed To Substantiate Its Claims of Harm

In addition to failing to demonstrate that its members do not possess market power in the switched access market, USTelecom has not demonstrated that any of the alleged harms it cites are attributable to dominant carrier regulation. USTelecom identifies the "specific obligations that flow directly from dominant carrier regulation" from which it seeks relief as including rate regulation and the filing of tariffs "with applicable cost support for services on a minimum notice of seven days or more."²² It alleges that in contrast to dominant carriers, non-dominant carriers "are not subject to rate regulation and may file tariffs on one day's notice without cost support."²³ Contrary to USTelecom's assertion, the Commission establishes the default rates that all carriers may charge other carriers for switched access services, including those charged by

²¹ USTelecom Petition at 18-20, 45-46.

²² *Id.* at 9.

²³ *Id.*

non-dominant carriers.²⁴ While non-dominant carriers may not be required to submit cost support with their tariff filings, they are required to benchmark their switched access rates to levels no higher than the rates charged by the ILEC serving the same geographic area.²⁵ The benchmarking requirement obviates any need for non-dominant carriers to file separate cost support for their switched access rates. Moreover, unlike incumbent LECs, non-ILECs are not permitted to recover from the Connect America Fund any part of the access charge rate reductions required by the Commission's intercarrier compensation/universal service reforms.²⁶ In the unlikely event that the Commission decides that ILECs should be freed from the dominant carrier requirement to provide cost support for their annual tariff filings, which it should not do, it must also decide that ILECs should be relieved of the right to recover lost switched access revenues from the Connect America Fund.

With respect to applications to discontinue, reduce or impair services, USTelecom objects that dominant carriers must wait 60 days for such applications to be automatically granted whereas non-dominant carriers must only wait 31 days.²⁷ USTelecom does not allege how the additional 29 days that the Commission allots for the processing of dominant carrier discontinuance, reduction or impairment of services applications disadvantages its members.

²⁴ 47 C.F.R. §§ 51.701, 51.901, 51.907, 51.909, 51.913, 61.26. All carriers, including dominant carriers, are free to enter into voluntary agreements with other carriers for rates different from the default rates. 47 C.F.R. §905(a).

²⁵ 47 C.F.R. §61.26.

²⁶ 47 C.F.R. §§ 915(f), 51.917(f); *Connect America Fund* at ¶¶ 850. 853.

²⁷ USTelecom Petition at 9-10. Section 63.71(c) of the Commission's Rules, 47 C.F.R. §63.71(c) provides that applications to discontinue, reduce or impair service filed by non-dominant carriers shall be automatically granted on the 31st day after their filing unless the Commission notifies the applicant otherwise. Applications to discontinue, reduce or impair service filed by dominant carriers shall be automatically granted on the 60th day after their filing unless the Commission notifies the applicant otherwise.

Similarly, USTelecom complains that dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfer of control under Section 214 than are non-dominant carriers.²⁸ While true, dominant carriers do qualify for presumptive streamlined treatment under some circumstances.²⁹ More importantly, the Commission may remove any transfer of control application, whether involving dominant or non-dominant carriers, from stream-lined processing at any time after it is filed.³⁰

Without explaining how, USTelecom contends that continued application of dominant carrier tariffing, discontinuance of service and transfer of control regulations to ILEC switched access services:

impedes the deployment of new technologies and services;
impedes the ability of ILECs to invest in new IP based networks;
undermines incentives of network users to adopt new technologies;
requires irrational investment in old technologies that is likely to become stranded; and
siphons investments away from new networks and services.³¹

Although this parade of horrible was lifted right out of the Commission's 2010 National Broadband Plan, the Broadband Plan did not attribute any of these negatives to dominant carrier tariffing requirements or discontinuance of service or transfer of control regulation of switched access services.³² Carrier's carrier revenues represent a source of income to the ILECs and

²⁸ USTelecom Petition at 10.

²⁹ 47 C.F.R. §63.03(b).

³⁰ 47 C.F.R. §63.03(c).

³¹ USTelecom Petition at 20-23.

³² See National Broadband Plan at 59 (unspecified "regulations require certain carriers to maintain POTS – a requirement that is not sustainable – and lead to investments that could be stranded;" "[t]hese regulations can have a number of unintended consequences, including siphoning investments away from new networks and services." *Id.* at 142 ("current [intercarrier compensation] system creates disincentives to migrate to all IP networks;" uncertainty about "whether or what intercarrier compensation payments are required for VoIP traffic . . . may be

neither the tariffing, discontinuance of service, nor transfer of control regulations that apply to carrier's carrier services siphon investments away from new networks and services, impede the deployment of new technologies and services or impede the ILECs' ability to invest in new IP networks except to the extent that ILECs have in the past chosen to invest in their legacy networks at the expense of upgrading those networks in order to ensure continued collection of switched access charges.

To the extent that the National Broadband Plan recommended that the Commission phase out regulated per-minute intercarrier compensation charges in an effort to remove disincentives to migrate to all IP networks and hindrances to investment and the introduction of new IP-based services,³³ the Commission has implemented that recommendation and required all carriers to gradually reduce switched access rates over time to an end point of \$0.³⁴ In doing so, the Commission opined that the transition to bill and keep would advance "the policy goals of accelerating the migration to all IP networks . . . and promoting the deployment of new broadband networks," realize the goal of "promoting investment in IP networks as quickly as possible," and provide the certainty and predictability that carriers and investors need "to make

hindering investment and the introduction of new IP-based services and products." The Broadband Plan cited comments filed by AT&T for the proposition that regulations require certain carriers to maintain POTS. *Id.* at 70, n. 199. The cited AT&T Comments do not identify any particular regulations that require carriers to maintain POTS but suggest that state carrier of last resort regulations may be to blame. See AT&T Comments – NBP PN #25, filed December 22, 2009 in GN Docket Nos. 09-47, *et al.*, at 24-25. The Commission has no jurisdiction over state carrier of last resort regulations.

³³ National Broadband Plan at 136, 142, 144, 148-150.

³⁴ See 47 C.F.R. §§51.901 *et seq.*

investment and deployment decisions.”³⁵ Thus, the Commission has already taken steps to eliminate any investment disincentives that may have resulted from the prior switched access regime and USTelecom has not shown that treating ILECs as non-dominant for purposes of tariffing, discontinuance of service or transfer of control regulation of switched access services is necessary to incentivize investment in modern IP networks.

CONCLUSION

For the foregoing reasons, the Commission should deny USTelecom’s request that all ILECs be declared non-dominant in the provision of switched access services.

Respectfully submitted,

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³⁵ *Connect America Fund* at ¶¶ 9, 736, 790, 792, 794. The Commission also expressed concern that the prior intercarrier compensation system impeded investment, deterred deployment of IP networks and was unfair to consumers. *Id.* at ¶ 9.